BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA V. FORNES Claimant	)	
V.	)	
JUNCTION CITY WIRE HARNESS Respondent	)	Docket No. 1,072,953
AND	)	
MITSUI SUMITOMO INS. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 2, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Bryce D. Benedict of Topeka, Kansas, appeared for claimant. Mickey W. Mosier of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant's date of accident for her injury by repetitive trauma to be January 28, 2015, the day she was placed on modified or restricted duty by a nurse practitioner pursuant to K.S.A. 2014 Supp. 44-508(e)(2). The ALJ concluded the notice letter sent by claimant's counsel to respondent did not comply with K.S.A. 2014 Supp. 44-520(a)(4) because it had no information regarding which body part was injured or how the injury occurred. The ALJ determined claimant failed to provide timely notice to respondent of her repetitive trauma and denied compensation.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 1, 2015, Preliminary Hearing; the transcript of the March 26, 2015, evidentiary deposition of Cynthia Carlyon and exhibits; and the transcript of the March 26, 2015, evidentiary deposition of Jeffrey Lee Patterson and the exhibit, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the issue before the ALJ was whether she injured her shoulder at work and not timely notice; therefore, claimant contends the ALJ exceeded her jurisdiction in denying compensation by ruling on an issue not before the Court. Claimant argues she

met her burden of proving an injury by repetitive trauma to the right shoulder. Additionally, claimant argues she was never provided restrictions by a physician, but rather by a nurse practitioner, which does not meet the requirements of K.S.A. 2014 Supp. 44-508(e). Claimant alleges her date of accident is February 12, 2015, the last day she worked for respondent, making her notice of an injury by repetitive trauma timely.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues claimant did not prove her right shoulder injury occurred as a result of repetitive use, cumulative traumas or microtraumas in the course of her employment. Respondent contends the issue of timely notice is a jurisdictional question which may be raised at any time, and claimant did not provide timely notice to respondent.

The issues for the Board's review are:

1. Did the ALJ exceed her jurisdiction by ruling on defenses not raised by respondent?

2. Did claimant provide respondent with timely notice of her right shoulder injury?

3. Did claimant meet her burden of proving an injury to her right shoulder as a result of repetitive use, cumulative traumas or microtraumas in the course of her employment with respondent?

FINDINGS OF FACT

Respondent makes electrical wire harnesses for specialty and industrial use. Claimant began working for respondent in 2006 as a former, a position requiring repetitive use of the upper extremities. A former takes electrical wires that have been cut and terminated, and physically forms the wires into a harness. Claimant worked as a former for the duration of her employment with respondent. Claimant also worked part-time as a dietary aide for a nursing home. Claimant testified her part-time position was "a real easy job" because she did not have to lift her arm above her shoulder while performing her duties.[1] Claimant stated she began having problems with her right shoulder approximately 1.5 years prior to the preliminary hearing due to movements she made while working for respondent.

Claimant first went to a doctor on May 30, 2014. Claimant indicated she sought treatment for her back at that time and not her shoulder. Claimant testified:

> I went to the [Konza Prairie Community Health Center] doctors and there was some confusion as to whether or not the reason I was there was for a work-related injury.

[1] P.H. Trans. at 14.

> I told them that it was not. But a friend of mine who was there with me told them that it was related to work. They refused to see me at that point because my friend told them that it had to do with work. So I went to Geary Community Hospital. And they did see me at the hospital. But I felt bad about it because I knew that the injury was not related to the work injury and I told them that.[2]

Cynthia Carlyon, respondent's human resources manager, testified she maintains an absentee calendar for each employee. Ms. Carlyon generated a memo on February 12, 2015, in which she recorded, from memory, a conversation held with claimant in June 2014. Ms. Carlyon wrote:

> [Claimant] left work on 05.30.14 to see a doctor for shoulder pain. The next work day, she came to my office and said she was wrong and couldn't tell a lie. She stated that she had told the doctor that the pain was from being hurt at work, but after thinking about it, she decided that she couldn't lie and that she was going to tell them the truth, which was that her work was not the cause of the pain. . . . I did not receive any worker's compensation papers on [claimant]. Nor did I receive any notification that her shoulder pain was work related.[3]

Claimant returned to Konza Prairie Community Health Center (Konza Prairie) in November or December 2014 with right shoulder pain. Claimant testified she did not inform respondent of her shoulder pain for fear she would be terminated.

On January 28, 2015, claimant was given restrictions of no repetitive activity with the right upper extremity for two weeks by Norma K. Linde, a nurse practitioner at Konza Prairie. Claimant gave the restrictions to Jeffrey Patterson, respondent's plant manager, the following morning. Mr. Patterson testified he asked claimant if her injury was work-related so that an accident report could be completed. Claimant told him no accident report was necessary because her condition was not work-related. Claimant disputed Mr. Patterson's testimony and stated she never had a conversation with Mr. Patterson regarding either an accident report or where she hurt her right shoulder.

An "Encounter Form" from Konza Prairie dated January 28, 2015, noted claimant had work-related right shoulder pain for over a year. Ms. Carlyon testified neither she nor anyone at respondent had seen the form until it was provided by counsel. Mr. Patterson agreed with Ms. Carlyon's testimony, stating he did not see the form until the day of his deposition on March 26, 2015. Claimant testified she had seen the form when the nurse completed it, but was not provided a copy.

---

[2] *Id*. at 8-9.

[3] Carlyon Depo., Ex. 5 at 1.

Respondent placed claimant in an accommodated position, where she remained until she returned to Konza Prairie on February 11, 2015, for right shoulder problems. Ms. Carlyon testified she spoke with claimant the following day about the visit. Ms. Carylon recorded:

> [Claimant has] put up with the pain for a year, and went to the doctor yesterday because she couldn't take it anymore. The doctor told her that the pain is from aging, and rest and therapy were needed for her to find relief.[4]

Claimant disputed Ms. Carlyon's record, stating no doctor has said aging is the cause of her shoulder pain. Claimant testified she was referring to back pain when speaking with Ms. Carlyon.

On February 11, 2015, claimant was placed on restrictions of no repetitive activity with the right upper arm indefinitely, again by Norma Linde. Claimant gave the restrictions to respondent the following day. Respondent could not accommodate claimant's restrictions and terminated claimant on February 12, 2015.

Ms. Carlyon described respondent's standard procedure when an employee reports an injury:

> We will send them to – if [Mr. Patterson] gets it to me, he sends it to me, and I send them up to AlphaCare for the doctors to evaluate them, and see what action needs to be taken, whether it's therapy or whatever's needed to restore them to good health.[5]

On February 19, 2015, respondent received a letter from claimant's attorney demanding the production of documents and requesting medical treatment and temporary total or temporary partial disability compensation.[6] Ms. Carlyon testified she did not complete an accident report until after she received notification from claimant's attorney.[7] Ms. Carlyon indicated she did not send claimant to AlphaCare at that time because claimant was no longer employed at respondent. Ms. Carlyon testified claimant never claimed a work injury, and she was not aware of any work-related injury until receiving correspondence from counsel.

---

[4] *Id.*

[5] Carlyon Depo. at 13.

[6] See *Id.* at 28; Ex. 9.

[7] *Id.* at 13-14.

Claimant testified she currently has problems in the top and down the front of her right shoulder.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the

content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2014 Supp. 44-508(e) states:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2014 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2014 Supp. 44-534a(a)(2) states, in part:

> A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS

1. Did the ALJ exceed her jurisdiction by ruling on defenses not raised by respondent?

The Board can review only those issues listed in K.S.A. 2014 Supp. 44-534a(a)(2). Those issues are: (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.[10] The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.[11]

An ALJ is entitled to rule on issues based upon the evidence presented. There has been no showing the ALJ exceeded her authority; the application for Board review on this issue will not be considered for lack of jurisdiction.

2. Did claimant provide respondent with timely notice of her right shoulder injury?

"When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not

---

[8] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2014 Supp. 44-555c(j).

[10] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[11] K.S.A. 2014 Supp. 44-551(l)(2)(A).

be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction."[12]

The ALJ found the date of accident to be the date claimant was placed on restricted duty by Norma K. Linde, a nurse practitioner. In addition to the last date of employment, K.S.A. 2014 Supp. 44-508(e) defines the date of accident for injuries by repetitive trauma as the date a claimant is taken off work, placed on restricted duty, or advised the condition is work-related by a **physician**. A nurse practitioner is not a physician.

In a claim where the claimant was placed on restrictions by a physician assistant, a Board member wrote, "Reading language into the Kansas Workers Compensation Act that a physician assistant's restrictions are on par with restrictions from a physician would be impermissible judicial blacksmithing."[13] The undersigned agrees. In order to apply K.S.A. 2014 Supp. 44-508(e)(1)-(3), the medical opinion must come from a physician and not a nurse practitioner or physician assistant.

The only other date of accident that can be applied to the facts of this case is claimant's last day worked. Claimant last worked on February 12, 2015. The undersigned finds the date of accident to be February 12, 2015.

Claimant alleges a letter demanding documents and workers compensation benefits dated February 13, 2015, fulfills the requirement for notice. Respondent acknowledges receipt of a letter on February 19, 2015. The ALJ found the letter did not provide sufficient information regarding the particulars of the injury. There are no indications in the letter regarding why or for what treatment was needed. The undersigned agrees with the ALJ the February 13, 2015, letter does not fulfill the notice requirements of K.S.A. 2014 Supp. 44-520(a)(4).

Under K.S.A. 2014 Supp. 44-520(b)(1), the notice requirement is waived if the employee proves that the employer had actual knowledge of the injury. Ms. Carlyon completed an accident report on February 19, 2015, seven days after the date of accident. The accident report was not placed into evidence. Ms. Carylon testified:

> Q. Did you fill out an accident report or supervisor's incident report or something like that here locally?
>
> A. I did after we received notification that she had been to an attorney.

---

[12] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[13] *Elsten v. Weaver Manufacturing, Inc.*, No. 1,062,125, 2013 WL 485719 (Kan. WCAB Jan. 15, 2013).

> Q. I'm sorry, I wasn't specific enough. I wasn't referring to [claimant] specifically, just in general.
>
> A. Oh, yes, anytime, anytime an employee says that they have an injury or if they bring back, you know, something from Konza [Prairie] that says they've been injured at work, it's a repetitive injury, we send them up to get checked out. We fill out the accident report and send them on their way.[14]

If respondent had no knowledge of an injury, as alleged, an accident report would not have been completed. The undersigned finds respondent had, at a minimum, actual knowledge of an injury by February 19, 2015. As such, the notice requirements set forth in K.S.A. 2014 Supp. 44-520(a) are waived.

3. Did claimant meet her burden of proving an injury to her right shoulder as a result of repetitive use, cumulative traumas or microtraumas in the course of her employment with respondent?

The ALJ did not make a finding in her April 2, 2015, Order regarding the issue of whether claimant suffered an injury arising out of and in the course of her employment with respondent. K.S.A. 2014 Supp. 44-534a(a)(2) limits the Board's review of a preliminary Order to findings with regard to a disputed issue. As no finding was made on this issue, the Board has no jurisdiction to review this issue.

CONCLUSION

This Board Member lacks jurisdiction to address the ALJ's decision to rule on the notice issue. Claimant provided timely notice of repetitive trauma. This Board Member lacks jurisdiction to address the issue of whether claimant failed to prove an injury by repetitive trauma arising out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated April 2, 2015, is reversed and remanded for a determination of other issues raised by the parties but not addressed in the Order.

IT IS SO ORDERED.

---

[14] Carlyon Depo. at 13-14.

Dated this _____ day of May, 2015.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Bryce D. Benedict, Attorney for Claimant
bryce.benedict@eschmannpringle.com

Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
mwmosier@cml-law.com

Rebecca Sanders, Administrative Law Judge